

**ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU**



Advisory Opinion No. 302

This is an advisory opinion in response to your letter requesting the Ethics Commission's advice as to whether a City officer ("A") within the Department of Budget and Fiscal Services [BFS], is in violation of City ethics laws because A authorized a contract to be executed in violation of the state procurement law and now allows the contract to continue in effect while a BFS employee serves on the contractor's board of directors.

The Commission understands the facts relative to your inquiry to be as follows:

In September 1998, BFS advertised for bids for a non-profit beach concession that had been set aside for a non-profit beachboy association, despite the fact that it had been specifically excluded from the state law that all public concessions must be awarded only after public bid. On October 28, 1998, BFS accepted bids from two non-profit corporations. A beachboy club ("XYZ") was awarded the contract on the basis of submitting the high bid.

Another beachboy association ("DEF") protested to BFS the contract award upon learning that a member of the board of directors of XYZ, is an employee ("B") of BFS. DEF alleged that B's employment created a conflict of interest in BFS's decision as to whom the contract would be awarded.

A then requested an advisory opinion of the Ethics Commission in the matter. The Commission issued its opinion on December 7, 1998, that since the contract was awarded after competitive bidding, no violation of any City ethics law had occurred.

On January 25, 1999, B submitted a written letter of resignation to XYZ. It followed B's oral resignation on January 22, 1999, at an XYZ board meeting. At some point, DEF filed suit against the City in this matter. On August 27, 1999, the court filed an order which, among other things, ruled that putting the concession out for bid had violated state law. However, the court was not clear about how the City should proceed. The original contract with XYZ remains in operation while the City attempts to resolve this matter.

The ethical question presented is whether the existence of a competitively-bid City contract with a non-profit company in which a City employee served on the board of directors violates the City's Standards of Conduct.

The general rule in relation to this question is found in the Revised Ordinances of Honolulu 1990, Section 3-8.2(e), which states in pertinent part:

No officer or employee of the city...shall...[e]nter into any contract in behalf of the city with an officer or employee or with a business in which an officer or employee has a controlling or substantial financial interest, involving the furnishing of services, materials, supplies and equipment **unless the contract is**

**made after competitive bidding...**(emphasis added).

Under the definitions found in ROH, Section 3-8.1, "'Financial interest' means an interest held by an individual...which is...a directorship or officership in a business." In that same set of definitions,

"Business" means and includes (1) a corporation; (2) a partnership; (3) a sole proprietorship; (4) institutions; (5) trusts; (6) foundations; or (7) any other individual or organization carrying on a business, **whether or not operated for profit** (emphasis added).

Based on the evidence presented, the Commission finds that that question was already answered in its December 7, 1998, opinion. As explained then, the award of the contract last fall created no violation of City ethics laws. Subsequent to that opinion, a court ruled that state law had been violated in using competitive bidding as the basis for the award of that contract. Whether or not the existing contract is now void is a matter over which the Ethics Commission has no jurisdiction. Furthermore, since B has long since resigned as a member of XYZ's board of directors, there is now no reason for any of the City's ethics laws to be triggered in regard to any future contracting with XYZ.

Dated: November 19, 1999

FAY M. UYEMA  
Chair, Ethics Commission